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NO. 92-945

IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC.,
Petitioner

v.

AMERICAN AIRLINES AND
AMR CORPORATION,
Respondents

**Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

PETITIONER'S REPLY MEMORANDUM

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RULE 29.1 LISTING

Petitoner's Rule 29.1 listing is contained in its Petition for Writ of Certiorari at p. ii n.1.

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PETITIONER'S REPLY MEMORANDUM

The fundamental premise of American's brief in opposition is that there is no conflict between this case and decisions of this Court or any other court of appeals. Brief in Opp. at 8. The premise is demonstrably false. First, the conflict in the circuits on the appropriate standard for granting mandamus in attorney- disqualification cases is demonstrated beyond argument in Judge Posner's recent opinion, *In re Sandahl*, No. 92-3129, 1992 U.S. App. LEXIS 31574 (7th Cir. Dec. 2, 1992). Judge Posner specifically identifies this case as one in which appropriate mandamus standards were not met. Second, the Fifth Circuit's holding that a trial court has no discretion in ruling on attorney disqualification is in conflict with

other circuits. Third, the Fifth Circuit acknowledged that the substantial-relationship test it applied in this case was in conflict with that of the Second Circuit. Pet. App. A at A-10 to A-11. The new duty-of-loyalty test the Fifth Circuit has created is unique and in conflict with all other circuits.

American asserts that the facts were undisputed, and then devotes much of its opposition to giving its partisan version of highly disputed facts in an effort to create the impression that disqualification was justified. The record clearly establishes that the district court resolved critical factual issues in favor of Northwest, and that the Fifth Circuit improperly substituted its own fact findings for those of the district court that it repudiated.

The Fifth Circuit decision has created a situation in which disqualification in federal courts will turn on venue. Prior to suit being filed in a particular circuit, a law firm will not be able to determine whether it would be disqualified. The conflict in ethical standards combined with a new mandamus standard of review that is equivalent to an interlocutory appeal calls for resolution of these issues by this Court.

I
THE DECISION OF THE FIFTH CIRCUIT FUNDAMENTALLY CONFLICTS WITH THIS COURT'S MANDAMUS STANDARDS AND WITH THE DECISIONS OF OTHER CIRCUITS

In re Sandahl, No. 92-3129, 1992 U.S. App. LEXIS 31574 (7th Cir. Dec. 2, 1992), which American cites but does not discuss, illuminates and deepens the extent to which this case conflicts both with this Court's decisions on mandamus and with mandamus decisions involving attorney-disqualification orders from other

circuits.[1]

The issue in *Sandahl* was the availability of mandamus jurisdiction to review a trial-court order granting disqualification. In this opinion, which was not available at the time Northwest filed its Petition for Writ of Certiorari, the Seventh Circuit analyzed the problem of defining mandamus jurisdiction in attorney-disqualification cases in the wake of this Court's decisions in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) and *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). The court noted that two views of mandamus jurisdiction have emerged in disqualification cases: the broad view is epitomized by the decisions of the Fifth Circuit in this case and in *In re Dresser Industries, Inc.*, 972 F.2d 540 (5th Cir. 1992) and by the Ninth Circuit in *Christensen v. United States District Court*, 844 F.2d 694 (9th Cir. 1988); the narrow view is epitomized by decisions of the First, Sixth, and Tenth Circuits. *Sandahl* at *8-*9. The Seventh Circuit adopted the narrow view and granted the writ on the facts of the case.

In the opinion, Judge Posner discussed the apparent contradiction presented in *Richardson-Merrell*, in which this Court held that orders granting disqualification do not impose the type of irreparable harm necessary for collateral orders, while at the same time implying that such orders may constitute sufficient irreparable

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[1] American's comment that the present case is one of only five reported decisions since *Firestone Tire & Rubber Co. v. Risjord* in which a ruling on a disqualification order has been corrected by mandamus, Brief in Opp. at 9, misses the point. The concern for this Court is the sheer number of times this issue has arisen and the confusion in standards created by the conflicting approaches of the circuits. *See* Pet. at 11-13 and n.5.

harm for mandamus review. *Sandahl* at *1-*9. The court recognized, however, that it is the differences between collateral-order appeals and mandamus that may justify the difference in the requirement of showing harm: whereas an appeal of a collateral order is effectively a matter of right and is subject to the same standard of review as an appeal of a final judgment, review by mandamus is discretionary and the standard of review is narrower than in an ordinary appeal. *Id.* at *4-*6. The court criticized the decisions in the present case, *Dresser*, and *Christensen*, in which the requirement of a "clear right to relief . . . is allowed to slide into mere right to relief, on the theory that disqualification cases usually turn on the interpretation of ethical standards rather than disputed facts, and hence raise 'legal issues' on which appellate courts do not defer to trial courts . . . ." *Id.* at *8-*9. To "avoid the collapse of mandamus into appeal," the Seventh Circuit adopted a "patently erroneous" standard for litigants seeking mandamus to set aside attorney-disqualification orders. *Id.* at *9.

The present case demonstrates that the Seventh Circuit was rightly concerned with the ease with which mandamus can be collapsed into appeal in attorney-disqualification cases. As Judge Posner observed:

> If review by means of mandamus means the same thing as review by means of appeal, however, the Supreme Court in holding that an order of disqualification is not a collateral order immediately appealable under the final-decision rule of 28 U.S.C. § 1291 may have accomplished little or nothing except to rename "appeal" "mandamus."

Id. at *2. This Court's decisions will be reduced to exactly that if the decision of the Fifth Circuit in the present case is allowed to stand.

II
THE FIFTH CIRCUIT IMPROPERLY SUBSTITUTED ITS OWN FACT FINDINGS FOR THOSE OF THE DISTRICT COURT

American asserts that in reversing the district court the Fifth Circuit did no more than apply appropriate legal and ethical principles to undisputed facts. Brief in Opp. at 13-14. American's description of the Fifth Circuit's action is plainly wrong. Although American uses its brief in opposition to reargue the facts and to paint the worst possible picture of the conduct of Vinson & Elkins, American's lengthy recital of the facts proves what Northwest has already shown. The district court resolved critical factual disputes in favor of Northwest. Pet. App. B at B-2 to B-3. The Fifth Circuit recognized that there were contested questions of fact (Pet. App. A at A-7) but then improperly made its own extensive *de novo* fact findings repudiating those of the lower court. *See* Pet. at 17-19; Pet. App. B at B-2 to B-3.

The underlying facts governing the relationship between Vinson & Elkins's prior representation of American and its representation of Northwest were strongly contested. The evidence consisted of extensive affidavits and papers generated in the earlier representations. The sworn testimony sharply conflicted on virtually all factual issues material to the relationship between Vinson & Elkins's prior representation of American and its present representation of Northwest: the nature and extent of the services provided by Vinson & Elkins in three different matters, the confidentiality of the information imparted to Vinson & Elkins, and the similarity of the

issues in the relevant matters.[2]

The district court "carefully examined" the "voluminous pleadings" and resolved these fact disputes in favor of Northwest. The court expressly determined that the matters Vinson & Elkins handled for American "were only tangentially related to this litigation" and that any information actually received by Vinson & Elkins "was not sufficient to cause any material prejudice" to American. Pet. App. B at B-2 to B-3. The Fifth Circuit reviewed *de novo* the voluminous record, resolved these factual disputes in American's favor, and rejected the findings of the district court.

American's concession that the substantial-relationship determination is "fact bound," Brief in Opp. at 15, illustrates the fundamental flaw in American's position. Precisely because this determination is fact bound, the Fifth Circuit was required to give deference to the district court's findings. Northwest is not, as American suggests, asking this Court to review the Fifth Circuit's fact findings to see if they are correct. Rather, Northwest is asking this Court to grant certiorari and to reverse the Fifth Circuit precisely because that court improperly made *de novo* fact findings of its own.

In *Sandahl*, the Seventh Circuit recognized that mandamus may be appropriate when "without elaborate considerations of contested facts and legal principles," it is apparent that a district-court order on disqualification is "plainly wrong." *Id.* at *6-*7.

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[2] Compare the affidavits of Steinberg (R-6) with those of Smith, Stern and Murchison (R-10). The Smith, Stern and Murchison affidavits have been lodged under seal with the Clerk of this Court.

Here, as American's brief so clearly shows, the Fifth Circuit granted the writ only after an elaborate analysis of the facts and law resulting in substitution of its own fact findings for those of the district court.

III

THE FIFTH CIRCUIT REJECTED THE WIDELY ACCEPTED RULE THAT ATTORNEY DISQUALIFICATION IS WITHIN THE DISCRETION OF THE DISTRICT COURT

Northwest has shown in its petition that other circuits have consistently held that a ruling on attorney disqualification is committed to the discretion of the trial court and that the appropriate standard of review is abuse of discretion. Pet. at 16. In this case, the Fifth Circuit expressly disavowed the abuse-of-discretion standard it had applied in previous decisions. Pet. App. A at A-7; Pet. at 15-16.

American seeks to confuse the issue by arguing that abuse of discretion is not the standard applied by other circuits in attorney-disqualification cases even though those circuits state that it is the standard they use. Brief in Opp. at 14-15 and n.11.[3] American argues it has found no case in which a court determined that the substantial-relationship standard was violated but refused to disqualify counsel. Brief in Opp. at 14. American's argument is circular. Trial courts utilize their discretion in applying the substantial-relationship test. If the relationship is not substantial enough,

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[3] For instance, in *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976), the Ninth Circuit expressly recognized that attorney disqualification based on the substantial-relationship rule was within the sound discretion of the trial court. 534 F.2d at 1325.

disqualification is denied. Other circuit courts review the trial courts' exercise of discretion. They do not, as was done here, make *de novo* findings and reverse merely because they disagree with the trial court.

IV
THE FIFTH CIRCUIT ADOPTED A NEW AND UNWORKABLE "DUTY OF LOYALTY" STANDARD FOR ATTORNEY DISQUALIFICATION IN FORMER-CLIENT CONFLICT CASES

American's characterization of the substantial-relationship standard adopted by the Fifth Circuit in this case is also flawed. As Northwest's Petition makes clear, loyalty is relevant to the substantial-relationship test, but its relevance is based on the concern for protection of client confidences and the resulting breach of loyalty that would arise if such confidences were improperly revealed. A plain reading of the Fifth Circuit's opinion reveals that the panel's standard detaches the duty of loyalty from the concept of the protection of confidences. Pet. App. A at A-25 to A-32.[4] The Fifth

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[4] American makes much of the point that in applying the substantial-relationship test, courts will presume that confidences were revealed to the attorney by the former client. Brief in Opp. at 16-17. American's argument ignores the fact that in the district court American submitted in camera evidence which it claimed demonstrated that confidences had been revealed to Vinson & Elkins that would prejudice American in this litigation. The district court rejected American's argument. Under these circumstances, application of a presumption of shared confidences under the substantial relationship test "simply makes no logical sense". *United States Football League v. National Football League*, 605 F. Supp. 1448, 1462 (S.D.N.Y. 1985). As the court in *National Football League* explained, the "purpose of the assertedly irrebuttable presumption is to foreclose proof relating to confidences. Once the parties agree to permit such proof, the purpose the irrebuttability rule is supposed to serve is gone; hence the rule itself--assuming there is such a rule--should be gone as well for purposes of this

Circuit acknowledged that its standard could permit disqualification of an innocent client's freely chosen counsel even in cases in which continued involvement by counsel would pose no threat of tainting the proceedings. Pet. App. A at A-10 to A-11.

American even argues that there is no difference between the test applied by the Fifth Circuit and the "taint" test of the Second Circuit and other courts. Brief in Opp. at 17 n.13. The Fifth Circuit itself thinks otherwise. After describing the Second Circuit view that disqualification is proper only "where a court also finds that the unethical conduct threatens to taint the trial", the Fifth Circuit said that it had "struck a different balance" and "[w]e have squarely rejected this hands-off approach in which ethical rules `guide' whether counsel's presence will 'taint' a proceeding . . . ." Pet. App. A at A-10 to A-11.[5]

CONCLUSION

The Fifth Circuit's decision impermissibly expands mandamus jurisdiction and introduces a new and unworkable duty of loyalty in lieu of the established substantial-relationship standard. The decision patently conflicts with the mandamus standards established by this Court and with attorney-disqualification cases from other circuits. This Court should grant the writ to resolve these conflicts and to clarify these important issues.

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case." *Id.* (citation omitted).

[5] The standard for attorney disqualification in federal courts is a question of federal law. Under the Fifth Circuit's approach, the ethical standard that will apply in former-client conflict cases will depend on where the case is litigated. Such a result is unfair to both lawyers and their clients.

Respectfully submitted,

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